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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 MITCHELL ANTHONY SLAUGH,

10 Plaintiff,

11 v.
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13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.
16

No. 4:16-CV-05069-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
18 No. 18, 20. Attorney David L. Lybbert represents Mitchell Anthony Slaugh
19 (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the
20 Commissioner of Social Security (Defendant). The parties have consented to
21 proceed before a magistrate judge. ECF No. 6. After reviewing the administrative
22 record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for
23 Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

24 **JURISDICTION**

25 Plaintiff filed an application for Disability Insurance Benefits (DIB) on
26 November 14, 2012 alleging disability since October 14, 2012 and an application
27 for Supplemental Security Income (SSI) on December 20, 2012 alleging disability
28 since December 3, 2010. Tr. 106, 117, 207-222. Plaintiff alleged disability due to

1 bipolar disorder, sleep apnea, insomnia, Chiari Type I Malformation, and anxiety.
2 Tr. 267. The applications were denied initially and upon reconsideration. Tr.
3 144-151, 154-165. Administrative Law Judge (ALJ) Jo Hoenninger held a hearing
4 on September 3, 2014 and took testimony from Plaintiff and vocational expert,
5 Daniel McKinney. Tr. 39-95. At the hearing, October 14, 2012 was identified as
6 the alleged date of onset for both claims. Tr. 46. The ALJ issued an unfavorable
7 decision on October 31, 2014. Tr. 20-33. The Appeals Council denied review on
8 March 29, 2016. Tr. 1-7. The ALJ's October 31, 2014 decision became the final
9 decision of the Commissioner, which is appealable to the district court pursuant to
10 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on May 26, 2016.
11 ECF No. 1, 4.

12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing transcript, the
14 ALJ's decision, and the briefs of the parties. They are only briefly summarized
15 here.

16 Plaintiff was 28 years old as of October 14, 2012. Tr. 207. Plaintiff has
17 completed some college. Tr. 268, 396. He reported that he stopped working on
18 October 15, 2012 because of his conditions. Tr. 267. His reported work history
19 includes work in database entry, automotive maintenance, software development,
20 food manufacturing, car dealership, manufacturing, telemarketing, shipping,
21 insulation, and furniture. Tr. 255, 295.

22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
25 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
26 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
27 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
28 not supported by substantial evidence or if it is based on legal error. *Tackett v.*

1 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
2 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
3 another way, substantial evidence is such relevant evidence as a reasonable mind
4 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
5 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
6 interpretation, the court may not substitute its judgment for that of the ALJ.
7 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
8 findings, or if conflicting evidence supports a finding of either disability or non-
9 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
10 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
11 substantial evidence will still be set aside if the proper legal standards were not
12 applied in weighing the evidence and making the decision. *Browner v. Secretary*
13 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

14 **SEQUENTIAL EVALUATION PROCESS**

15 The Commissioner has established a five-step sequential evaluation process
16 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
17 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
18 through four, the burden of proof rests upon the claimant to establish a prima facie
19 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
20 burden is met once the claimant establishes that physical or mental impairments
21 prevent him from engaging in his previous occupations. 20 C.F.R. §§
22 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
23 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
24 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
25 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
26 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If the claimant
27 cannot make an adjustment to other work in the national economy, a finding of
28 "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

ADMINISTRATIVE DECISION

On October 31, 2014, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since October 14, 2012. Tr. 22.

At step two, the ALJ determined Plaintiff had the following severe impairments: mild Chiari I Malformation; migraine headaches; substance addiction disorder; and bipolar disorder. Tr. 22.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 22.

At step four, the ALJ assessed Plaintiff's residual function capacity to perform a full range of work at all exertional levels with the following nonexertional limitations:

The claimant is limited to frequent climbing of ramps and stairs, and occasional climbing of ladders, ropes, and scaffolds. The claimant is also limited to frequent balancing. The claimant should avoid concentrated exposure to hazards, such as unprotected heights and exposed moving mechanical parts. The claimant has no limitation in his ability to understand or remember. The claimant has sufficient concentration, persistence, and pace to complete simple, routine tasks for a normal workday and workweek with normal breaks. The claimant would not, however, be able to maintain sufficient concentration, persistence, and pace to complete more complex tasks.

Tr. 24-25. The ALJ identified Plaintiff's past relevant work as sandwich maker, shipping and receiving clerk, home attendant, computer programmer, material handler, furniture mover/driver, telemarketer, and food sales clerk. Tr. 31. The ALJ found Plaintiff would be able to perform his past relevant work as a sandwich maker. Tr. 31.

In the alternative to an unfavorable determination at step four, the ALJ found

1 at step five that, considering Plaintiff's age, education, work experience and
2 residual functional capacity, and based on the testimony of the vocational expert,
3 there were other jobs that exist in significant numbers in the national economy
4 Plaintiff could perform, including the jobs of small products assembler,
5 janitor/industrial cleaner, and hand packager. Tr. 31-32. Therefore, the ALJ
6 concluded Plaintiff was not under a disability within the meaning of the Social
7 Security Act at any time from October 14, 2012 through the date of the ALJ's
8 decision, October 31, 2014. Tr. 32.

9 ISSUES

10 The question presented is whether substantial evidence supports the ALJ's
11 decision denying benefits and, if so, whether that decision is based on proper legal
12 standards. Plaintiff contends (1) the ALJ failed to properly credit Plaintiff's
13 symptom statements, (2) substantial evidence supports a finding of disability, and
14 (3) the ALJ erred in her steps four and five determinations.¹

15 DISCUSSION

16 A. Plaintiff's Symptom Statements

17 Plaintiff contests the ALJ's determination that his symptoms statements
18 were less than fully credible. ECF No. 18 at 15-17.

19 It is generally the province of the ALJ to make credibility determinations,
20 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific

21
22 ¹Plaintiff identified issues with the ALJ's step five analysis and the ALJ's
23 treatment of Plaintiff's bipolar disorder in his "ISSUES" section of the briefing.
24 ECF No. 18 at 2. However, in the text of the briefing, Plaintiff argued that the
25 hypothetical presented to the vocational expert was incomplete because it was
26 missing limitations that allegedly result from Plaintiff's bipolar disorder. *Id.* at 18-
27 19. Therefore, the Court presents the issue of the hypothetical to the vocational
28 expert and its effect on steps four and five as a single issue for clarity.

1 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
2 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
3 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
4 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
5 "General findings are insufficient: rather the ALJ must identify what testimony is
6 not credible and what evidence undermines the claimant's complaints." *Lester*, 81
7 F.3d at 834.

8 The ALJ found Plaintiff less than fully credible concerning the intensity,
9 persistence, and limiting effects of his symptoms. Tr. 26. The ALJ reasoned that
10 Plaintiff was less than fully credible because (1) his "candid statements to treating
11 providers are not consistent with allegations of disabling functional impairments,"
12 (2) his "reported activities of daily living are also inconsistent with allegations of
13 disabling functional impairments," (3) his reported limitations were inconsistent
14 with the medical record. Tr. 26-27.

15 Plaintiff failed to challenge any of the ALJ's reasons for finding him less
16 than fully credible. Instead, Plaintiff simply asserted "None of the reasons offered
17 by the ALJ are clear and convincing of evidence that Mr. Slauch is not credible."
18 ECF No. 18 at 17. Considering Plaintiff's failure to challenge the ALJ's reasons
19 with specificity, the Court cannot consider his vague assertions. *See Carmickle v.*
20 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). The Ninth
21 Circuit explained the necessity for providing specific argument:

22 The art of advocacy is not one of mystery. Our adversarial system
23 relies on the advocates to inform the discussion and raise the issues
24 to the court. Particularly on appeal, we have held firm against
25 considering arguments that are not briefed. But the term "brief" in
26 the appellate context does not mean opaque nor is it an exercise in
27 issue spotting. However much we may importune lawyers to be
28 brief and to get to the point, we have never suggested that they skip
the substance of their argument in order to do so. It is no accident
that the Federal Rules of Appellate Procedure require the opening

1 brief to contain the “appellant’s contentions and the reasons for
2 them, with citations to the authorities and parts of the record on
3 which the appellant relies.” Fed. R. App. P. 28(a)(9)(A). We require
contentions to be accompanied by reasons.

4 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).²

5 Moreover, the Ninth Circuit has repeatedly admonished that the Court will not
6 “manufacture arguments for an appellant” and therefore will not consider claims
7 that were not actually argued in appellant’s opening brief. *Greenwood v. Fed.*
8 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to
9 provide adequate briefing, the court declines to consider this issue.

10 **B. Substantial Evidence**

11 Plaintiff argues that substantial evidence supports a determination that
12 Plaintiff is disabled. ECF No. 18 at 17-18. Plaintiff specifically argues that
13 evidence submitted to the Appeals Council must be considered by the Court and
14 that the statements of John Wurst, M.D., Nathan Henry, Psy.D., and Patricia Kraft,
15 Ph.D. support a finding of disability. *Id.*

16 If substantial evidence supports the administrative findings, or if conflicting
17 evidence supports a finding of either disability or non-disability, the ALJ’s
18 determination is conclusive. *Sprague*, 812 F.2d at 1229-1230. The Court must
19 consider evidence that was submitted to the Appeals Council in determining
20 whether the ALJ’s determination is supported by substantial evidence. *Brewes v.*
21 *Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012).

22 While there were three medical exhibits added to the record at the Appeals
23 Council, Tr. 664-672, Plaintiff failed to provide any argument on how this
24 evidence resulted in the ALJ’s decision not being supported by substantial
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27 ²Under the current version of the Federal Rules of Appellate Procedure, the
28 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

evidence. As such, the Court declines to consider these issues. *See Carmickle*, 533 F.3d at 1161 n.2.

C. Step Four and Five

Plaintiff argues that the ALJ erred at steps four and five by providing a hypothetical with an incomplete residual functional capacity to the vocational expert. ECF No. 18 at 18-19. He asserts that his inability to deal with supervisors, co-workers, or the public would have eliminated all past relevant work at step four and that missing work would render him unemployable at step five. *Id.*

A claimant's residual functional capacity is "the most [a claimant] can still do despite [his] limitations." 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(c) (defining residual functional capacity as the "maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs."). In formulating a residual functional capacity determination, the ALJ weighs medical and other source opinions and also considers the claimant's credibility and ability to perform daily activities. *See, e.g., Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009). An ALJ is only required to present the vocational expert with those limitations the ALJ finds to be credible and supported by the evidence. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001).

Here, Plaintiff failed to properly challenge the ALJ's credibility determination and treatment of medical source opinions. *See supra*. Because the Court does not consider issues not properly raised, there is no basis to revisit the residual functional capacity. The Court finds that the ALJ cited substantial evidence in support of the residual functional capacity determination, and that Plaintiff has not shown that the determination was in error.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision is supported by substantial evidence and free of harmful legal error.

1 Accordingly, **IT IS ORDERED:**

2 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
3 **GRANTED.**

4 2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **DENIED.**

5 The District Court Executive is directed to file this Order and provide a copy
6 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
7 **and the file shall be CLOSED.**

8 DATED August 28, 2017.



A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line and a small flourish.

12 JOHN T. RODGERS
13 UNITED STATES MAGISTRATE JUDGE
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